



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAR 31 2011

Emmett Cash III
3378 W. 84th Street
Apartment D
Inglewood, California 90305

RE: MUR 5951
Californians for Change f/k/a
Californians for Obama, and
Emmett Cash III, in his official
capacity as treasurer;
Emmett Cash III

Dear Mr. Cash:

Based on a complaint filed with the Federal Election Commission on November 5, 2007, and information supplied by you, the Commission, on December 3, 2008, found reason to believe that Californians for Change f/k/a Californians for Obama and its treasurer violated 2 U.S.C. §§ 432(e)(4), 441d(a), and 441h(b), and you violated 2 U.S.C. § 441h(b), and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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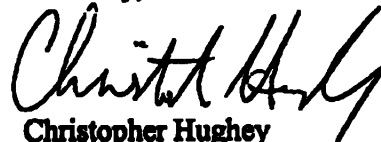
_____ | you may request a copy of your deposition transcript from this office
You may also request copies of the documents cited in the General Counsel's Brief. Please notify us if you would like to request a deposition transcript or copies of the documents cited in the General Counsel's Brief.

You may also request an oral hearing before the Commission. See Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007) and Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (Oct. 28, 2009). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Kasey Morgenheim, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Christopher Hughey
Acting General Counsel

Enclosure
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of

4
5 Californians for Change f/k/a)
6 Californians for Obama, and)
7 Emmett Cash III, in his official) **MUR 5951**
8 capacity as treasurer)
9 Emmett Cash III)

10
11 **GENERAL COUNSEL'S BRIEF**
12

13 **I. STATEMENT OF THE CASE**

14 This matter arose from a complaint filed by Ercell Hoffman alleging that Californians for
15 Change f/k/a Californians for Obama ("CFO" or "the Committee"), an unauthorized committee,
16 and Emmett Cash III misrepresented themselves as being affiliated with Presidential candidate
17 Barack Obama and operated in a fraudulent manner. After considering the complaint, CFO's
18 and Mr. Cash's responses to the complaint, and publicly available information, the Federal
19 Election Commission ("the Commission") found reason to believe that: (1) Californians for
20 Change f/k/a Californians for Obama and Kinde Durkee, in her official capacity as treasurer,
21 violated 2 U.S.C. §§ 432(e)(4) and 441d(a); (2) Californians for Change f/k/a Californians for
22 Obama and Kinde Durkee, in her official capacity as treasurer, violated 2 U.S.C. § 441h(b) by
23 willfully and knowingly participating in, or conspiring to participate in, a plan, scheme or design
24 to engage in fraudulent solicitation; and (3) Emmett Cash III violated 2 U.S.C. § 441h(b) by
25 willfully and knowingly participating in, or conspiring to participate in, a plan, scheme or design
26 to engage in fraudulent solicitation.¹ See Factual and Legal Analyses for CFO and Emmett Cash

¹ Emmett Cash III is the current treasurer of the Committee according to the Committee's amended Statement of Organization filed with the Commission on January 30, 2009. Kinde Durkee was the treasurer of the Committee at the time of the events described in this brief. Mr. Cash contends that he did not electronically file or sign the amended statement of organization and disputes the fact that he is the treasurer of the Committee. See Letter and Sworn Statement dated January 27, 2010.

III (setting forth bases of reason to believe findings). The Commission opened an investigation to ascertain the full extent of the Committee's and Mr. Cash's activities.

The ensuing investigation:

- Revealed that the Committee and Mr. Cash fraudulently misrepresented themselves as acting on behalf of Presidential candidate Barack Obama for the purpose of soliciting contributions. *See* 2 U.S.C. § 441h(b).
- Confirmed that the Committee's name, Californians for Obama, constituted an unauthorized use of a candidate's name. *See* 2 U.S.C. § 432(e)(4).
- Confirmed that CFO did not use a proper disclaimer on its website, telemarketing calls, and other communications to clarify whether its activities were authorized by a candidate. *See* 2 U.S.C. § 441d(a).

In communications with potential contributors and some vendors, CFO and Mr. Cash represented the Committee in a manner that would lead a reasonable person to think that they were soliciting contributions on behalf of Obama's Presidential campaign. *See* 2 U.S.C. § 441h(b); *United States v. Thomas*, 377 F.3d 232, 241-43 (2d Cir. 2004) (holding that a scheme devised with the intent to defraud is fraud if it was reasonably calculated to deceive persons of ordinary prudence and comprehension). According to Mr. Cash, who served as the "State Chair" of CFO, the purpose of CFO was "to make our community aware of [Obama's] candidacy and to ensure that we would have a hold on him should he win and to register people and those kinds of things." Deposition of Emmett Cash III, dated November 23, 2009 ("Dep.") at 19: 15-19. Mr. Cash also raised the possibility that CFO was a "draft committee."² Dep. at 141: 2-15. While

² Draft committees are political committees established solely to draft an individual or to encourage him or her to become a candidate. Draft committees may include the name of the individual in the name of the committee, provided the committee's name clearly indicates that it is a draft committee. *See* 11 C.F.R. § 102.14(b)(2).

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1 promoting the candidate was permissible activity, some of Mr. Cash's and CFO's activity
2 crossed the line into fraudulent solicitation under section 441h.

3 Based on the results of the investigation, which are set forth and analyzed below, the
4 General Counsel is prepared to recommend that the Commission find probable cause to believe
5 that Californians for Change d/k/a Californians for Obama and Emmett Cash III, in his official
6 capacity as treasurer, violated 2 U.S.C. §§ 432(e)(4), 441d(a), and 441h(b), and find probable
7 cause to believe that Emmett Cash III violated 2 U.S.C. § 441h(b).

8 **II. STATEMENT OF THE FACTS**

9 The investigation demonstrated that Mr. Cash was central to CFO's creation and
10 operation, and we are unaware of any other individuals aside from vendors who communicated
11 with the general public on behalf of the Committee. Through CFO, Mr. Cash made fraudulent
12 misrepresentations to certain vendors and the general public that caused individuals to believe
13 that CFO was fundraising for the Obama campaign. In response to these fraudulent solicitations,
14 CFO received approximately \$15,800 in contributions. Further, CFO violated the Act by using a
15 candidate's name in the name of an unauthorized committee and failing to include disclaimers
16 that conformed to the Act's requirements on several communications.

17 **A. Formation of CFO**

18 Mr. Cash explained that the idea to form the Committee came about when one of his
19 friends, Reverend Bill Johnson, now deceased, encouraged him to form a committee to support
20 Barack Obama's Presidential bid so that the candidate would be receptive to the concerns of the
21 African-American community. Dep. at 15: 24 - 16: 14. Mr. Cash testified that Reverend
22 Johnson came up with the idea for the name "Californians for Obama." Dep. at 20: 4-7.
23 According to Mr. Cash, the Committee, which included Reverend Johnson and two other

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1 individuals, decided that Mr. Cash should be named the "State Chair" of CFO. Dep. at 23: 6-15.
2 The investigation has shown that Mr. Cash was in charge of CFO's strategy and acted on its
3 behalf almost entirely by himself.³

4 CFO's Statement of Organization, filed on December 12, 2006, identified CFO as an
5 unauthorized single candidate committee supporting Barack Obama. The Statement of
6 Organization also identified Kinde Durkee as treasurer and custodian of records for the
7 Committee. Mr. Cash retained Ms. Durkee and her firm, Durkee and Associates, LLC, to do all
8 of the Committee's "reporting...and handling all the money." Dep. at 22: 12-15. According to
9 both Mr. Cash and Ms. Durkee, Ms. Durkee had no role in the strategy of the Committee and
10 was strictly involved in the financial reporting and Commission compliance. Dep. at 22: 19-24.
11 In an interview, Ms. Durkee asserted that Cash approached her to set up a Committee to help get
12 Obama elected and told her that the Obama campaign was enthusiastic about the idea.

13 The Committee opened an office in Inglewood, California, although Mr. Cash stated that
14 he only paid rent for the office space on one occasion. Dep. at 25: 3-6. The Committee's
15 disclosure reports do not include any disbursements for rent. CFO launched a website at
16 www.californiansforobama.com, although Mr. Cash claimed that, even as the Committee's State
17 Chair, he did not know who maintained the website and never visited it himself. Dep. at 147: 2 -
18 148: 2. Mr. Cash averred that "they probably put on the website my information that I gave to
19 someone, but that would be all." Dep. at 147: 15-16.

³ CFO was not Mr. Cash's first involvement with politics. According to Mr. Cash, he became involved in politics thirty to forty years ago, and participated in the campaigns of Jimmy Carter, Jesse Jackson, Congresswoman Diane Watson, Ross Perot, and an effort to draft Colin Powell, among others. Dep. at 8-12. Mr. Cash stated that he registered a draft committee for Colin Powell with the Commission. Dep. at 15: 10-11. California state records indicate that Mr. Cash registered an entity titled "Citizen's for Powell California Committee," but we were unable to locate further information. An individual in Cleveland, Ohio filed a Statement of Organization for "Citizens for Powell" with the Commission on June 29, 1995, but did not file any other disclosure reports. Citizens for Powell was administratively terminated by the Commission in 2000.

B. CFO's Activities

At the time of the complaint, publicly available information showed that CFO organized several activities, including the "Women of Power Cruise" that was the subject of the complaint and an "Internet Telethon" that could be accessed from the Committee's website. *See Factual and Legal Analyses for CFO and Emmett Cash III at 3-6.* The investigation uncovered additional evidence about these activities and several others that CFO organized in conjunction with the 2008 Presidential election, most notably CFO's fundraising through telemarketing solicitations. This evidence indicates that both contributors and vendors believed that CFO was conducting activities on behalf of the Obama campaign based on Mr. Cash's representations.

1. CFO's Telemarketing Solicitations

One of the Committee's main fundraising efforts was a telemarketing campaign conducted by Precision of Iowa ("Precision"), a Pennsylvania-based telemarketing firm. On January 29, 2007, Emmett Cash III, as "State Chairman and Coordinator" of Californians for Obama, and Irene Waitzman, President of Precision, signed a Letter of Agreement for telemarketing services. *See Letter of Agreement in Kinde Durkee Response to Commission's Subpoena to Produce Documents and Order to Submit Written Answers ("Durkee Response") at D6499-0501.* The Precision invoices show that the telemarketing calls raised a total of \$2,245 for CFO from February 12, 2007, through March 13, 2007. *See Precision of Iowa invoices at Durkee Response at D0980, D0954, D0997, D1014, D1037, D1076, D1077, D1106, D1107, D1139, and D1140.* Ms. Waitzman provided a log indicating that Precision made nearly 17,000 calls on behalf of CFO between February 6, 2007 and March 3, 2007. *See Waitzman email to Office of General Counsel dated June 8, 2009.*

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1 The telemarketing script produced to us strongly implies that the call was being made on
2 behalf of the Obama campaign. *See* script at Durkee Response at D0496-497. The script says
3 that the caller is calling on behalf of "Californians for Obama," and explains that "We are
4 Senator Barack Obama's California Organization to help put the face-of-change in the White
5 House. We are calling tonight to receive your financial support for Senator Obama's 2008
6 presidency's bid." *Id.* at D0496. The script goes on to solicit contributions of several dollar
7 amounts and identifies to the potential contributor several of Senator Obama's policy positions
8 on issues such as health care, foreign oil dependence, and the Iraq war. *Id.* Each time the caller
9 solicited funds, he or she was to ask "Can Senator Obama count on your support with a [dollar
10 amount] donation today?" *Id.* In an interview, Ms. Waitzman stated that this version of the
11 script was not the one used for Precision's telemarketing on behalf of CFO; however, she and
12 Mr. Cash were unable to specify how the final script varied from the version produced, except
13 that Ms. Waitzman thought the caller would not have been directed to ask for a contribution so
14 many times during each call. She did confirm that the final version used the language "calling
15 on behalf of Californians for Obama." She was unable to provide us with the final version of the
16 telemarketing script, and Mr. Cash stated that he did not think that he ever saw a final version of
17 the script. Dep. at 64: 22-24.

18 The script produced to us contains the handwritten words "Approved Emmett Cash State
19 Chairperson Californians for Obama," and Mr. Cash confirmed the signature on the document
20 was his. Dep. at 54: 15-18. Mr. Cash initially explained that he wrote "approved" on the script
21 because it was "the verbiage to be used" in the telemarketing calls. Dep. at 54: 19-22. However,
22 he later claimed that he only approved it to be sent on to Kinde Durkee for her review and
23 approval of the substance of the script because he had doubts about the language, despite his

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1 assertion earlier in his deposition that Ms. Durkee was only involved in the financial aspects of
2 the Committee. Dep. at 55-66. In an interview, Ms. Durkee told us that she did not approve this
3 or any other script to be used in the Precision telemarketing calls and that she did not recall
4 speaking to Mr. Cash or any individual at Precision about the substance of the script.

5 **2. Women of Power Cruise**

6 The complaint in this matter focused on the "Women of Power Cruise," an event
7 organized by CFO that complainant Emmett Hoffmann paid \$2,423.76 to attend, but for which she
8 never received a refund when the cruise was cancelled. A promotional brochure for the "Women
9 of Power Cruise" described the event as a "3-Day Cruise with Powerful & Power-filled Women"
10 scheduled for September 21-24, 2007. See "Women of Power Cruise" brochure at Durkee
11 Response at D0618. The brochure contained the name "Emmett Cash III, State Chairman &
12 Coordinator, Californians for Obama" and included the Committee's FEC identification number
13 and the Committee's website address. *Id.* Mr. Cash indicated that the brochure was mailed to
14 approximately 800 to 1500 women from his personal mailing list. Dep. at 105: 3-8. Durkee and
15 Associates' records show that CFO raised \$550 from the cruise, but that does not appear to
16 include Ms. Hoffman's payment. See Profit & Loss Accounting at Durkee Response at D0940.
17 The "Women of Power Cruise" was ultimately cancelled due to negative press that reported that
18 CFO and Cash were claiming to raise money in support of Obama's campaign, but instead Cash
19 was personally profiting from the fundraising. Dep. at 107: 4-14; see also Carla Marinucci,
20 *Fundraiser Cashes In - Obama Gets Zero*, San Francisco Chronicle, July 25, 2007. We
21 interviewed two people who registered for the cruise and a vendor who printed materials for the
22 cruise, and they each thought that the cruise would benefit the Obama campaign. See *infra*
23 pp. 17-19.

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3. Internet Telethon

The Committee's website included a link to an "Internet Telethon." Available at <http://web.archive.org/web/20070401093323/http://www.californiansforobama.com>. A flyer advertised that the "Obama Internet Telethon" would take place on March 25, 2007, from 2-10 P.M. PST and gave the Committee's website and a toll-free telephone number. "Internet Telethon" brochure at Durkee Response at D0548. The flyer also featured the heading "Californians for Obama," a picture of the candidate, and a statement from Edmund Cash III that included, "I am serving as State Chairman of 'Californians for Obama' to give Senator Obama the opportunity to become the next President of the United States...With your help we, the people, can support Senator Obama for President of the United States...." *Id.* A press release from CFO dated March 14, 2007, advertised that "a host of entertainers will convene to lend their support for Senator Barack Obama, and his run for the Presidency of the United States." Press release at Durkee Response at D0169.

The telethon featured several speakers, including Mr. Cash, who repeatedly asked viewers to go to CFO's website and contribute up to \$2,300 to support Obama's presidential campaign. Mr. Cash explained that the telethon was supposed to air on March 25, 2007, but that the company that he had arranged to provide bandwidth for viewing did not air it at the proper time. Although CFO placed the telethon on its website, Mr. Cash, who testified that he did not know who maintained the website and never visited it himself, further averred that he was unaware of the placement of the telethon on the CFO website and did not authorize this action. Dep. at 109: 19 - 110: 11 and 147: 25 - 148: 2. The solicitations in the "Internet Telethon" would lead a reasonable person to think that CFO was soliciting contributions on behalf of Obama's Presidential campaign because of the speakers' reference to the contribution limits and

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1 Mr. Cash's statements that contributions would support Obama's candidacy. CFO's telethon
2 was introduced as "the presidential election campaign telethon for Barack Obama" and speakers
3 solicited contributions using phrases such as "the success of the campaign is in your hands" and
4 "he can't make it unless we get your support," which implied that the contributor was giving to
5 the Obama campaign. Mr. Cash maintained that no contributions were raised as a result of the
6 telethon, and we discovered no contrary evidence. Dep. at 128: 2-4.

7 **4. Merchandise Sales**

8 CFO began selling merchandise in January 2007. The Committee's website included a
9 link to a "Campaign Memorabilia" page that sold "Obama '08" and CFO merchandise, including
10 bumper stickers, t-shirts, and caps. An undated invoice from Bay Cities Printing shows that CFO
11 ordered t-shirts and sweatshirts totaling \$487.50. Invoice at Durkee Response at D0196. Durkee
12 and Associates produced order forms for "Californians for Obama – Campaign Memorabilia
13 Items" that had been filled out by individuals who purchased merchandise from Cash and CFO.
14 Individuals could order a variety of merchandise and pay by credit card, check, cash, money
15 order, or purchase order. See, e.g., Order form at Durkee Response at D0467. Mr. Cash stated
16 that the Committee sold both Californians for Obama merchandise and general Obama '08
17 merchandise. Dep. at 81: 8-12. Mr. Cash continued selling both CFO and general Obama-
18 themed merchandise until November 2008, after the Committee had changed its name to
19 "Californians for Change" in August 2007. He conducted those later sales while volunteering at
20 the 47th Assembly District Democratic Club office in Culver City, California. Dep. at 88: 10-17.
21 Some of the contributors we interviewed who purchased CFO merchandise believed that the
22 proceeds of the sales would benefit the Obama campaign, and some believed that the proceeds
23 would benefit CFO or pay the cost of the merchandise. See *infra* p. 18.

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5. Other Activities

The investigation showed that the Committee planned additional activities, some of which never took place, and none of which raised any contributions. CFO scheduled a "Movin' and Groovin' for Obama Concert Tour" at several locations in California during August 2007 and planned to sell tickets ranging in price from \$7.00 to \$2,300.00. See Ticket prices and schedule at Durkee Response at D0112. According to Cash, the Committee never sold any tickets and they decided not to have the concerts because of accusations against him and CFO in the press that the fundraising efforts were benefitting Cash personally instead of the Obama campaign. Dep. at 95: 11-22.

The Committee conducted very little activity once it changed its name to "Californians for Change" in August 2007, other than Mr. Cash's sale of merchandise at the 47th Assembly District Democratic Club office. The Committee held a "California High Tea" event on January 21, 2009, in Washington, D.C in conjunction with the Presidential inauguration. See letter at Durkee Response at D0008. Mr. Cash stated that no fee was charged for attendance and that Californians for Change received no contributions as a result of the event. Dep. at 154: 17-21. Mr. Cash maintained that Californians for Change has not solicited any individual for contributions since the 2008 Presidential election. Dep. at 155: 20-22.

CFO's financial records show that the Committee spent more money than it received in contributions. See Profit & Loss Accounting at Durkee Response at D0940-0941. CFO made a large percentage of its expenditures for office supplies (\$1,526), merchandise (\$2,120), equipment rentals for events (\$2,060), printing (\$1,815), reimbursements to Mr. Cash for gasoline and meals (\$2,078), and telemarketing and accounting fees (\$1,971). *Id.* The Committee disclosed a single \$480 independent expenditure in support of Barack Obama. The

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1 Committee's 2009 Year-End Report also disclosed \$1,800 in debt to Mr. Cash and \$6,430 in
2 debt to Durkee and Associates.

3 **C. CFO's Communications with Obama for America**

4 The investigation revealed that Emmett Cash communicated with Obama for America,
5 Barack Obama's 2008 principal campaign committee, on behalf of CFO. In Mr. Cash's
6 Response to the Commission's Subpoena and Order, he identified three individuals at Obama for
7 America – Jordan Kaplan, Jennifer Mason, and "Tori" – with whom he asserted he had telephone
8 conversations. *See* Emmett Cash III Response to Commission's Subpoena to Produce
9 Documents and Order to Submit Written Answers ("Cash Response") included in Durkee
10 Response at D0680. In describing his relationship with Obama for America, Cash asserted that
11 "they welcomed our support. We were told that we were one of the first offices to open in the
12 state of California." *Id.* When we asked Mr. Cash about the details of these conversations, he
13 could not remember when the telephone conversations had taken place or the positions that the
14 individuals he spoke to held at Obama for America. Dep. at 37-41. For example, regarding his
15 conversation with Jordan Kaplan, Mr. Cash said "I remember discussing that we were going to
16 be supporting Obama. That we were opening up an office and bla, bla, bla [sic]...It's my
17 understanding that they needed all the help and support that they could get, and that's what he
18 said." Dep. at 38: 21 - 39: 3. Mr. Cash recalled similar conversations with Jennifer Mason and
19 "Tori." *See* Dep. at 39: 21 - 40: 5 and 41: 6-10. Mr. Cash testified that his intent behind calling
20 these individuals at Obama for America was not to ask permission to operate Californians for
21 Obama, but "just to inform them." Dep. at 40: 10-15. He also testified that he did not tell either
22 Mr. Kaplan or Ms. Mason that he was going to be collecting funds. Dep. at 40: 6-9.

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1 Cash also wrote a letter addressed to "Official Committee Operations Person" at an
2 Obama Field Office in Chicago, Illinois. The letter is signed by Cash, who is identified as "State
3 Chairman and Coordinator" of Californians for Obama, and it is dated March 23, 2007. Durkee
4 Response at D0163. The letter reads "Article 11 CFR 100.5 states that our committee must have
5 your approval to continue to support Senator Obama as an official committee in order to
6 maintain our committee and offices in California."⁴ *Id.* The letter further states, "We are aware
7 that weekly reporting to the national campaign is required should we be granted permission to
8 continue... We can finance our participation in the campaign and also direct funds to the needs of
9 the national campaign." *Id.* Mr. Cash confirmed that he wrote the letter to the Obama campaign
10 to "inform them as to what we were doing." Dep. at 127: 1-2. He said that Kinde Durkee may
11 have prompted him to write the letter and likely gave him information about the regulatory
12 provision cited. Dep. at 128: 22 - 129: 21. Although the letter states that CFO must have the
13 Obama campaign's approval to continue operations, Mr. Cash admitted that CFO "did conduct
14 some type of activities" after he sent the letter in March 2007. Dep. at 131: 7-12. Mr. Cash also
15 did not believe that CFO started weekly reporting to the Obama campaign, as described in the
16 letter. Dep. at 131: 22 - 132: 2. In fact, CFO's Mid-Year 2007 Report disclosed that the
17 Committee received almost \$3,000 in itemized contributions after Cash's letter to the Obama
18 campaign, including contributions received for the "Woman of Power Cruise."

19 In an interview, Ms. Durkee stated that she spoke to an FEC Reports Analysis Division
20 ("RAD") Analyst when CFO was first organized who told her that the Committee could conduct
21 certain activities without being an official Obama committee, but that CFO would have to notify

⁴ Section 100.5 of the Commission's regulations defines "political committee" including "authorized committee," which appears to be what Mr. Cash means by "official committee" of Obama. See 11 C.F.R. § 100.5(f)(1). An authorized committee means the principal campaign committee or any other political committee authorized by a candidate under 11 C.F.R. § 102.13 to receive contributions or make expenditures on behalf of such candidate. See 11 C.F.R. § 100.5(f)(1). There is no indication that Barack Obama ever authorized CFO.

1 the Obama campaign and get permission to operate once it reached \$5,000 in contributions or
2 expenditures. Ms. Durkee stated that the RAD Analyst told her that the Committee could use the
3 name "Californians for Obama;" however, according to RAD, there was no such authorization.
4 Ms. Durkee also recalled Mr. Cash telling her that he was in communication with the Obama
5 campaign and that they were supporting his activities. She remembered having a conversation
6 with Mr. Cash about getting permission from the Obama campaign to operate and told him that
7 he had to ask for permission in writing and receive a response from the Obama campaign in
8 writing. It was her understanding that Mr. Cash sent a letter to the Obama campaign when CFO
9 reached \$5,000 in contributions and expenditures. Ms. Durkee told us that she never saw a draft
10 of the March 23, 2007, letter, but that she did remember seeing it after it had been sent.

11 The available information indicates that Obama for America did not contact CFO until
12 July 17, 2007, when Robert F. Bauer, General Counsel of Obama for America, wrote a letter to
13 Mr. Cash. See Letter at Durkee Response at D0657-0658. The letter requested that Cash cease
14 operations as "Californians for Obama" and cited to Commission regulations prohibiting the
15 Committee from using the name of a federal candidate in its own name because of the possibility
16 of mistake or confusion. *Id.* While the letter is dated approximately four months after Mr.
17 Cash's letter to the Obama campaign, it was written on the same date that the San Bernadino
18 County Sun published an article that identified Mr. Cash as Obama's "state campaign chairman"
19 in California and stated that the Obama for America campaign was opening a campaign office in
20 San Bernadino. See Mike Cruz, *Obama's Campaign Coming to San Bernadino*, San Bernadino
21 County Sun, July 17, 2007. Mr. Cash stated that as a result of this letter, CFO changed its name
22 to "Californians for Change," although he did not think that individuals were confused about
23 whether CFO was affiliated with the Obama campaign as a result of its name. Dep. at 135: 25 -

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136: 10. On August 9, 2007, the Committee filed an amended Statement of Organization that changed its name to Californians for Change.

III. LEGAL ANALYSIS

A. Fraudulent Misrepresentation

Under section 441h(b) of the Act, a person cannot fraudulently misrepresent himself as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations, and a person cannot "willfully or knowingly participate in or conspire to participate in any plan, scheme, or design to" engage in any of the misrepresentations described above. *See* 2 U.S.C. § 441h(b); *see also* 11 C.F.R. § 110.16. To violate section 441h, the Act requires that the violator have the intent to deceive, but does not require that the violator satisfy all elements of common law fraud. "Unlike common law fraudulent misrepresentation, section 441h gives rise to no tort action..." and therefore, proof of justifiable reliance and damages is not necessary. *See Explanation and Justification of 11 C.F.R. § 110.16*, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002); *see also Neder v. United States*, 527 U.S. 1, 24-25 (1999) (citing *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1999) (interpreting federal mail, wire, and bank fraud statutes)). Further, courts have held that even absent an express misrepresentation, a scheme devised with the intent to defraud is still fraud if it was reasonably calculated to deceive persons of ordinary prudence and comprehension. *See United States v. Thomas*, 377 F.3d 232, 241-43 (2d Cir. 2004) (interpreting federal statute prohibiting the inducement to travel in furtherance of a scheme to defraud), *citing Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954) (interpreting federal mail fraud statute).

Based on the available evidence set forth above, CFO and Mr. Cash violated section 441h(b) by fraudulently misrepresenting that they were acting on behalf of the Obama campaign

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1 to both contributors and vendors. The evidence shows that Mr. Cash acted with intent to deceive
2 contributors. Mr. Cash signed "approved" on a draft telemarketing script that contained many
3 phrases that suggested CFO's affiliation with the Obama campaign, including "We are Senator
4 Obama's California organization to help put the face-of-change in the White House. We are
5 calling tonight to receive your financial support for Senator Obama's 2008 presidency's bid,"
6 and "Can Senator Obama count on your support with a [dollar amount] donation today?"⁵ See
7 script at Durkee Response at D0496. Mr. Cash attempted to distance himself from this language
8 during his deposition, *see supra* pp. 6-7, but was unable to identify how the language may have
9 been different in the final script used for the calls. Mr. Cash also asserted that although he
10 signed "approved" on the draft telemarketing script, he expected Kinde Durkee to review its
11 substance, even though he had earlier stated that she was only involved in the Committee's
12 finances. Dep. at 22, 55-66. In an interview, Ms. Durkee denied reviewing the telemarketing
13 script.

14 The circumstances of CFO's telemarketing campaign resemble the solicitations in MUR
15 5472 (Republican Victory Committee), where the Commission found probable cause to believe
16 that the respondents violated 2 U.S.C. § 441h(b) by soliciting contributions through
17 telemarketing that implied that the committee was affiliated with or acting on behalf of the
18 Republican Party. See MUR 5472 Certification, dated October 21, 2008. The Commission filed
19 suit against the respondents in this matter pursuant to 2 U.S.C. § 437g(a)(6) and the court granted
20 the Commission's Motion for Summary Judgment on April 14, 2010. See *FEC v. Novacek*, Civ.
21 No. 09-CV-00444 (N.D. Tex.). Ms. Novacek, the main respondent, appealed to the Fifth Circuit,

⁵ As noted, neither the telemarketing vendor nor Mr. Cash were able to specify any changes between the "draft" and final script other than the number of times the caller would have asked for a contribution.

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1 and the court granted the Commission's motion for summary affirmance on September 16, 2010.
2 *See FEC v. Novacek*, No. 10-10616 (5th Cir.).

3 Further, Mr. Cash's March 23, 2007, letter to the Obama campaign evidences his belief
4 that he needed permission to continue to operate CFO, but he sent this letter after the Committee
5 had already conducted a significant telemarketing campaign, and he did not suspend operations
6 when Obama for America did not respond to his letter for four months. Although Mr. Cash
7 testified that the purpose of CFO was to make people aware of Obama's candidacy and that CFO
8 may have been a draft committee, *see supra* p. 2, Cash's actions on behalf of CFO went beyond
9 promotion of Obama's candidacy and demonstrate that he knowingly created the false
10 impression that CFO was fundraising on behalf of the Obama campaign.

11 Mr. Cash's verbal representations and the Committee's printed and electronic
12 communications made it reasonable for individuals to believe that CFO was fundraising for the
13 Obama campaign. The Committee's name "Californians for Obama," and Cash's title, "State
14 Chair" or "State Chairman," created the impression that the organization was the official
15 representative of the national Obama campaign in the State of California. The Committee's
16 website and printed materials prominently featured images of the candidate and appeals to
17 "support Senator Obama for President of the United States." *See, e.g., "Internet Telethon"*
18 brochure at Durkee Response at D0648. The Committee sold "Campaign Merchandise" that
19 included both "Californians for Obama" and "Obama '08" merchandise. Individuals who
20 interacted with Mr. Cash in conjunction with CFO operations, including printing vendor Fidel
21 Rodriguez, telemarketing vendor Irene Waitzman, and then-treasurer Kinde Durkee, all claimed
22 that Mr. Cash represented that he was in communication with the Obama campaign and that the
23 campaign was supporting his actions. All of these representations were reasonably calculated to

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1 deceive persons of ordinary prudence and comprehension, satisfying the fraudulent solicitation
2 standard in section 441h(b). *See United States v. Thomas*, 377 F.3d at 241-43.

3 Although reliance on the misrepresentation is not necessary to prove a violation of
4 section 441h, almost all individuals with whom we spoke who interacted with Mr. Cash or the
5 Committee's vendors on behalf of CFO believed that CFO was working on behalf of the Obama
6 campaign. We interviewed ten individuals who contributed to CFO in February and March 2007
7 as a result of the Precision telemarketing. Each one of those contributors thought that they were
8 supporting Barack Obama's Presidential campaign. Two the contributors, Barra Grant and Brian
9 Riley, explained that "We thought that we were giving to Obama. We wouldn't have given to
10 anyone else," and "Whatever they said must have been that they were from Obama
11 headquarters." One contributor, Jurante Izokaitis, said that she thought that she was contributing
12 to the Obama campaign at the time of the contribution, but she was suspicious afterward because
13 the caller told her to write the check to "Californians for Obama" rather than "Obama for
14 America." Another contributor, Vanessa Taylor, who explained that she had been to Obama
15 fundraisers and campaign events before she made this particular contribution, thought that
16 "Californians for Obama" was the name for Obama's official campaign in California. Several of
17 the contributors we interviewed indicated that they would be upset if their contributions did not
18 directly benefit the Obama campaign. None of the contributors we interviewed expressed the
19 belief that they were solicited by an organization independent of Obama's official campaign.

20 Many of the contributors who either paid for the "Women of Power Cruise" or purchased
21 CFO merchandise believed that the funds would benefit Obama's candidacy. Laura Pinkney
22 stated that based on the promotional materials she received by mail, she believed that the cruise
23 was a fundraiser for the Obama campaign and that at least some of the money would benefit the

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1 Obama campaign. The complainant, Ercell Hoffman, also received the cruise brochure by mail
2 and decided to attend in order to network, as well as to support Obama's effort to become
3 President. She stated that the contents of the brochure made her believe that the cruise was
4 connected with the Obama campaign.

5 Two of the contributors who purchased CFO merchandise thought that the proceeds of
6 the merchandise sales would benefit the Obama campaign, while the other two contributors
7 thought that they would benefit the Committee. Sandra Caldwell Hickman stated that she hoped
8 that the money was going to the Obama campaign. Holly Erbanke stated that she believed that
9 she was making a donation to the Obama campaign and that the name "Californians for Change"
10 made her think that the group was associated with the candidate because the word "change" had
11 been associated with the Obama campaign. By contrast, Mollie Wellinsky thought that her
12 purchase of Obama merchandise at the 47th Assembly District office would benefit Californians
13 for Change, and nobody suggested to her that the money would go to the Obama campaign. K.
14 Lorien Gray believed that the money was paying for the cost of the merchandise itself. She also
15 gave extra money that she thought would benefit the people running the storefront, although
16 nobody represented to her that they were affiliated with the Obama campaign.

17 The Committee's telemarketing and printing vendors either believed that Mr. Cash was
18 representing Obama's national campaign or that Obama's campaign had authorized his actions.
19 Ms. Waitzman, Precision's President, told us that when she entered into the agreement to provide
20 telemarketing services, Mr. Cash's title, "State Chairman and Coordinator," gave her the
21 impression that he had an official position with the Obama campaign, as well as the fact that Mr.
22 Cash "dropped a lot of names." Based on everything she was told, she stated that she was
23 absolutely sure that Mr. Cash was with the Obama campaign. However, Ms. Waitzman also

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1 stated Mr. Cash only told her that the Obama campaign was aware of his fundraising efforts, and
2 that he was not affiliated with the Obama campaign. Thus, at the least, Ms. Waitzman believed
3 that Mr. Cash was fundraising for the Obama campaign, and that the Obama campaign was
4 aware of Mr. Cash's fundraising on its behalf. Ms. Waitzman further explained that several
5 months into Precision's telemarketing effort for CFO, she had a conversation with a professional
6 associate who told her that Mr. Cash was not working for the Obama campaign. Upon learning
7 this information, she decided to sever Precision's relationship with CFO.

8 Fidel Rodriguez, the owner of Alternative Source LA, a printing company that printed
9 promotional materials for CFO, including for the "Women of Power Cruise," explained that
10 Emmett Cash contacted him in 2007 to do printing work for the Committee. According to Mr.
11 Rodriguez, Mr. Cash told him that he was with the Obama campaign and was working on a tight
12 budget. Mr. Rodriguez stated that because he believed that Mr. Cash was working for the
13 Obama campaign, he gave Mr. Cash a thirty percent discount and did not require the normal
14 procedure of payment at pickup for the printing jobs.⁶

15 The great majority of the evidence thus shows that Mr. Cash acted with intent to deceive
16 contributors. In doing so, he created the false impression that CFO was working on behalf of the
17 Obama campaign. Accordingly, we are prepared to recommend that the Commission find
18 probable cause to believe that Emmett Cash III and Californians for Change and Emmett
19 Cash III, in his official capacity as treasurer, violated 2 U.S.C. § 441h(b) by misrepresenting the
20 Committee as acting on behalf of Barack Obama's Presidential campaign.

⁶ Mr. Rodriguez stated that Mr. Cash did not pay him for some of the printing work Alternative Source did for the Committee, which prompted him to file a civil lawsuit against Mr. Cash. Documents indicate that CFO paid in full Alternative Source on invoices of \$480.00 and \$650.00, but only paid \$500.00 for an invoice of \$4,750.00.

B. Use of a Candidate's Name

With three exceptions that do not apply here, the Act prohibits the use of a candidate's name in the name of an unauthorized committee. 2 U.S.C. § 432(e)(4); *see also* 11 C.F.R. § 102.14(a).⁷ The investigation confirmed that CFO registered with the Commission in December 2006 and conducted activities and fundraising using the last name of candidate Barack Obama. It was not until August 9, 2007, that the Committee filed an amended Statement of Organization and changed its name from Californians for Obama to Californians for Change. Even if CFO initially intended to serve as a draft committee, it failed to include that intention in its name, and President Obama formally declared his candidacy on February 10, 2007, prior to much of CFO's activity. *See* 11 C.F.R. § 102.14(b)(2). Although former treasurer Kinde Durkee indicated that a RAD Analyst told her that the Committee could use the name "Californians for Obama," *see supra* pp. 12-13, according to RAD, no such authorization occurred. Accordingly, we are prepared to recommend that the Commission find probable cause to believe that the Committee violated 2 U.S.C. § 432(e)(4).

C. Lack of a Proper Disclaimer

The Act requires political committee public communications to contain disclaimers. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1). The disclaimer requirements apply to all internet websites of political committees. *See* 11 C.F.R. § 110.11(a)(1). The disclaimer requirements also apply to public communications, including communication by mass mailing or telephone bank. *See id.*; 11 C.F.R. § 100.26. A mass mailing and a telephone bank means more than 500 pieces of mail and more than 500 calls, respectively, of an identical or substantially similar

⁷ These exceptions apply to 1) delegate committees, 2) draft committees if the committee's name clearly indicates that it is a draft committee, and 3) special projects and other communications of unauthorized committees if the title clearly and unambiguously shows opposition to the named candidate. 11 C.F.R. § 102.14(b)(1) - (3).

1 nature within a 30-day period. 11 C.F.R. §§ 100.27 and 100.28. The communications, if not
2 authorized by a candidate, must clearly state the name and permanent street address, telephone
3 number, or World Wide Web address of the person who paid for the communication and state
4 that the communication is not authorized by any candidate or candidate's committee. 2 U.S.C.
5 § 441d(a)(3); 11 C.F.R. § 110.11(b)(3).

6 The Committee's website contained no disclaimer except for one on the "Contribute"
7 page, and that disclaimer failed to state whether the website was authorized by a candidate and
8 who paid for the website. Accordingly, we are prepared to recommend that the Commission find
9 probable cause to believe that the Committee violated 2 U.S.C. § 441d(a) by failing to include a
10 proper disclaimer on its website.

11 It is also likely that the Act's disclaimer requirements applied to the telemarketing
12 conducted by Precision of Iowa. Although, as previously discussed, the script produced by
13 Durkee and Associates was not the final version used in the telemarketing calls, Irene Waitzman
14 did not identify a substantial difference between the version of the script produced to us and the
15 script used for the calls, other than to note that she thought that the caller would not have asked
16 for a contribution so many times. Ms. Waitzman also produced a log of the telemarketing calls
17 Precision made on behalf of CFO, which totaled almost 17,600 calls made between
18 February 6, 2007, and March 3, 2007. As this number of calls indicates that there were more
19 than 500 identical or substantially similar calls made over a 30-day time period, the calls would
20 have required a disclaimer under the Act. As it is likely that there was no substantial difference
21 between the version of the script produced to us and the final script used in the Precision calls,
22 these communications failed to include the required disclaimer. Accordingly, we are prepared to

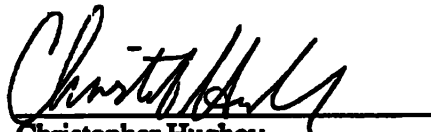
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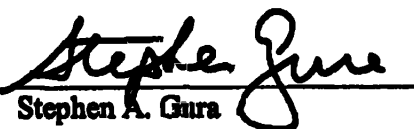
1 recommend that the Commission find probable cause to believe that CFO's telemarketing calls
2 failed to include a proper disclaimer in violation of 2 U.S.C. § 441d(a).

3 **IV. CONCLUSION**

4 Based on the foregoing, this Office is prepared to recommend that the Commission find
5 probable cause to believe that Emmett Cash III violated 2 U.S.C. § 441h(b) by misrepresenting
6 the Committee as acting on behalf of Barack Obama's Presidential campaign, and find probable
7 cause to believe that Californians for Change f/k/a Californians for Obama and Emmett Cash III,
8 in his official capacity as treasurer, violated 2 U.S.C. § 441h(b) by misrepresenting the
9 Committee as acting on behalf of Barack Obama's Presidential campaign, violated 2 U.S.C.
10 § 432(e)(4) by using the name of candidate Barack Obama in the name of an unauthorized
11 committee, and violated 2 U.S.C. § 441d(a) by failing to include a proper disclaimer on public
12 communications.

13
14 3-30-2011
15 Date

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